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CITATIONS

Case:

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Statute:

18 U.S.C. 152 2

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 808

LEONARD W. GUNZBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 25-29) is reported at 297 F. 2d 829.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1962 (Pet. App. 25). A petition for rehearing was denied on February 22, 1962. The petition for a writ of certiorari was filed on March 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the petitioner's conviction for fraudulently concealing from a trustee in bankruptcy assets belonging to a bankrupt estate.

2. Whether there was a fatal variance between the indictment and the proof.

STATUTE INVOLVED

Section 152 of Title 18 U.S.C. provides in pertinent part:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt;
>
> * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

After a trial by jury in the District Court for the Eastern District of Louisiana, the petitioner was convicted of fraudulently concealing assets of his bankrupt estate from the trustee in bankruptcy, in violation of 18 U.S.C. 152, *supra* (R. 2-7, 706, 710).[1] On November 18, 1960, he was sentenced to imprisonment

[1] The petitioner was acquitted by the jury on two counts of mail fraud (R. 5-7, 706, 709, 710).

for thirty months (R. 710). The conviction was affirmed on appeal (Pet. App. 25-29). 297 F. 2d 829.

The pertinent facts may be summarized as follows:

1. In early 1958, the petitioner operated a jewelry business in New Orleans, Louisiana, under the name "Manners Jewelers." On March 31, 1958, he filed a voluntary petition in bankruptcy and was adjudicated a bankrupt on the same day (R. 24-25, 37-39, 509, 610). In April 1958, a receiver in bankruptcy who was later designated trustee in bankruptcy was appointed, and three appraisers were designated to make an inventory and appraise the assets of the bankrupt estate (R. 25-28, 215). Thereafter, the assets of the bankrupt estate—including repair and "lay-away" items—were inventoried and appraised (R. 232, 234-236, 244, 261-262, 267, 284-285, 291).

In the meantime, one Cecil Shelton, who, as a sales representative of some custom jeweler firms, had supplied the petitioner with custom jewelry in the past, was instructed by his New York office to examine the stock of the bankrupt estate to see if there was "enough [stock] involved" in the proposed auction to warrant arrangements by the New York office to have someone present at the bidding (R. 135-136, 151). Shelton with the permission of the trustee examined all of the inventory except "lay-away" and repair items (R. 138, 147-150, 152-153, 160-165, 168).

On May 26, 1958, the bankruptcy court ordered the assets of the estate sold at public auction (R. 28). About 90% of the inventory was purchased in the name of the petitioner's half-sister for a corporation

which was being formed by the half-sister and others (R. 237-238, 510-511). The "lay-away" and repair items of jewelry which had not been picked up by respective customers were purchased for $1,350.00 in the name of the petitioner's half-sister for the corporation. Subsequently, "Manners Jewelers, Incorporated" was formed. The corporation took over the petitioner's former jewelry business, including its location, and retained the petitioner as store manager (R. 481, 512).

Early in 1960, Shelton noticed in the display window of "Manners Jewelers, Incorporated" some custom-made rings which he had supplied the petitioner prior to bankruptcy and which had not been included in the bankruptcy inventory (R. 92-104, 107-134, 137-145, 147-149). Shelton then contacted the F.B.I. On February 8, 1960, F.B.I. agents, armed with a search warrant, entered "Manners Jewelers, Incorporated". The agents seized a quantity of custom watches, rings and ring mountings inside the store and from among jewelry which the petitioner had pledged to another jewelry store as security for a loan (R. 42-44, 53-56, 64-65, 100-134, 137-145, 178-179). The indictment subsequently returned against the petitioner charged him with having concealed six watches, 69 ring mountings, and about 280 rings (R. 2-5).

2. Shelton testified at the trial that jewelry seized by the F.B.I. in 1960 and introduced into evidence was supplied by him to the petitioner prior to bankruptcy (R. 92-134, 139-143, 178-180). He said that he carefully examined two of the seized watches, and that, in his opinion, those items could not have been

"lay-away" or repair items (R. 166-167).[2] He said that he was the only representative who sold the particular brand of custom jewelry in his territory, which included Louisiana; that he could identify the jewelry by style characteristics and manufacturing process; and that his manufacturers employed unique and distinctive manufacturing designs on the jewelry (R. 124, 141, 176-180).

The trustee testified that he examined the premises of "Manners Jewelers" in connection with the bankruptcy proceedings and that most of the valuable items of jewelry were kept either in a nearby bank vault or in the store safe. He examined the contents of the vault and the safe about twelve times, and made an inventory of the stock in the store, including the "lay-away" and repair items (R. 218-221, 234-236). Of the jewelry seized by the F.B.I. in 1960, he said that he was "positive" that three platinum watches were not included in the bankruptcy inventory (R. 221-222). He identified some "very unusual" diamond rings as not having been included in the inventory (R. 226-227). One of the appraisers testified that certain rings seized by the F.B.I. were not included in the inventory of the bankrupt estate (R. 271-274, 281).

3. The petitioner testified that he did not conceal any jewelry or other assets from the trustee in bankruptcy (R. 537-540). He said that, subsequent to the bankruptcy sale, an employee found four plati-

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[2] As noted, Shelton, in his 1958 examination, had not seen the "lay-away" or repair items (R. 161).

num watches in a window section area of the store, and that he put those watches in the store safe as property of the corporation since the window section of the store was purchased for the corporation (R. 540-542; see R. 415). He testified that a "good deal" of the rings seized by the F.B.I. agents in 1960 were included in the bankruptcy inventory (R. 534-535). He said that some of those rings could have been in the store inventory, while others could have been in "lay-aways" and repairs (R. 535-537). Petitioner also testified that Shelton's line of rings was not unusual, that there were "a thousand wholesalers and manufacturers" who carried the "very same" watches and rings "in style, look, weight and color" (R. 522). He said that no jeweler could tell where a particular ring came from or pick out a "Delta" ring (Delta was one of Shelton's principals) from other rings (R. 522-523).

ARGUMENT

1. The petitioner contends (Pet. 14-22) that the evidence was insufficient to support the conviction because the government did not rebut the possibility that the contested items of jewelry could have been included in the "lay away" and repair inventory which was subsequently purchased for the corporation which took over petitioner's business. There was, however, ample evidence to support the jury's conclusion that the contested jewelry was not included within the "lay-away" and repair inventories.

As shown by the Statement, *supra*, pp. 3-4, the trustee notified the private individuals who had items

of jewelry in "lay-away" or repair stock to call for and redeem those items, and the balance of the "lay-away" and repair stock was sold to the petitioner's half-sister for $1,350 (R. 232-233, 238). It is inconceivable that the over 300 rings, ring mountings and watches in question, the mountings of which (without stones) had a *wholesale* value of about $12,000 to $14,000, could have been in the "lay-away" or repair inventories. The trustee and an appraiser testified that they had examined the "lay-away" and repair items and that certain watches and rings seized by the F.B.I. were not included in the bankruptcy inventory.[3]

2. The indictment charged the petitioner with the concealment of jewelry from the trustee in bankruptcy from April 18, 1958, to February 8, 1960. Subparagraph "B" of the count in question charged the petitioner with having concealed two "diamond ring mountings" supplied by the Delta Jewelry Corporation of New York and twelve "sets of diamond ring mountings" supplied by the Advanced Ring Company of New York, and with having pledged those items

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[3] In the court below, the petitioner also argued that the evidence was insufficient to show that the contested items of jewelry were supplied the petitioner prior to bankruptcy (see Pet. App. 27-28). In this Court, the petitioner concedes *arguendo* that the proof was sufficient to show that the jewelry in question was sold to him prior to bankruptcy (see Pet. 15). The proof showed that Shelton, corroborated by his own invoices and the testimony of another jewelry representative and his invoices, unequivocally identified the jewelry as that which had been supplied to petitioner before bankruptcy (R. 92-113, 196-212).

on a loan with the Canal Jewelry Company of New Orleans "on or about June 11, 1958" (R. 4). The proof showed that, on January 28, 1960, the petitioner had pledged 27 rings (with the stones) with the Canal Jewelry Company as collateral for a $5,000 loan (R. 64-68). The proprietor of the Canal Jewelry Company testified that the petitioner had in the past pledged jewelry as collateral for loans. On this basis, the petitioner contends that there was a "fatal variance" between the indictment and the proof since he was misled by the identity of the pledged goods (Pet. 8-14). There is no merit to the contention.

Petitioner was put on notice that he was charged with the concealment between April 18, 1958, and February 8, 1960, of a specified number of "diamond ring mountings" which had been supplied to him by certain ring manufacturers and had been pledged by him to the Canal Jewelry Company as security for a loan. That the petitioner had stones mounted in the ring mountings which he had acquired from the Advanced Ring and Delta Companies earlier—and that it was the mounted rings which had been pledged—did not detract from the fact that the petitioner had pledged the *mountings* in question, the precise items which he was charged with having concealed from his trustee. The error in the date of the pledge was not material since the pledge was not the illegal act charged; the statement in the indictment as to the pledge was merely an additional means of describing the items. The significant fact was that the mountings had been supplied to the petitioner prior to bankruptcy, and had not been included in

the bankruptcy inventory (R. 121-128). The fact that the items had been pledged after being concealed did not affect the essential facts of the offense of concealment—the proof of which was supplied by Shelton.

Moreover, the variance did not prejudice the petitioner's substantial rights because it related only to part of the assets. Petitioner was charged with having concealed, in addition, six watches, other ring mountings and about 280 rings (R. 2-5). As the court below pointed out (Pet. App. 29), "As to all the other items, the proof corresponded with the allegations of the indictment and was sufficient, in itself, to support appellant's conviction for concealing assets from his trustee. Under these circumstances, the variance would not be grounds for reversing the conviction. *United States* v. *Wodiska*, 2nd Cir., 147 F. 2d 38." See *Berger* v. *United States*, 295 U.S. 78.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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